



**INDIANA COURT OF APPEALS
ORAL ARGUMENT AT A GLANCE
HAMMOND CITY HALL, COUNCIL CHAMBERS —
HAMMOND**



Bruce C. Salamrino, et al. v. Town of Michiana Shores, et al.

Appeal from:

LaPorte Superior Court No. 2,
The Honorable Steven King,
Judge

Oral Argument:

Thursday, March 5, 2009
1:00 - 2:00 p.m. (Central time)
20 minutes each side

Municipal Law

Today we will discuss whether the Town of Michiana Shores acted properly in entering into an agreement to lease property to T-Mobile for the construction of a cell phone antenna tower and amending the Town's zoning ordinance to create a governmental zoning district.

CASE SYNOPSIS

Facts and Procedural History

In early 2006, T-Mobile approached the Town about the possibility of locating a cell tower in the Town. T-Mobile submitted a proposed site lease for property located at 513 El Portal Road near the town garage. On October 10, 2006, the Town Council met and authorized the Town to enter into a site lease by a simple majority vote.

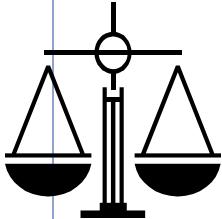
The Town apparently realized that it had not followed the statutory procedures required to lease municipal property. As a result, the Town began taking the necessary steps to comply with the statutes. At the November 14, 2006 Town Council meeting, the Town passed Resolution 2006-02, which authorized the Town to proceed under Indiana Code section 36-1-11-12, the alternate request for proposals procedure, rather than 36-1-11-10, the normal bidding procedure. The resolution was made retroactively effective to November 1, 2006. The Town scheduled a public hearing on the issue and published notice of the meeting

and requests for proposals from any company interested in constructing a cell tower on Town property.

At the town council meeting, the Town accepted T-Mobile's proposed site lease agreement as the only proposal submitted. The following day, the Town signed the site lease and the building commissioner issued a building permit for the construction of the cell tower. On December 12, 2006, the Town signed an addendum to the site lease. T-Mobile signed both the site lease and the addendum on February 28, 2007.

On December 15, 2006, Scalabrino and other residents of the Town filed a complaint including four counts: (I) request for a temporary restraining order ("TRO") preventing the construction of the cell tower; (II) request for a preliminary injunction for the same purpose; (III) request for a declaratory judgment that the construction of the cell tower violates the Town's municipal code and is

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CASE SYNOPSIS

prohibited; and (IV) request for a permanent injunction preventing the construction of the cell tower or any other structure that violates the Town's municipal code. That same day, the trial court held a hearing on and denied Scalabrinio's request for a TRO. Scalabrinio later added T-Mobile as a defendant to the lawsuit.

Beginning at the end of March, 2007, the Town began considering proposed amendments to its zoning ordinance and zoning map, which would create a governmental zoning district. On March 31, and April 3, 2007, the Plan Commission held a public hearing on Ordinance 2007-02, an amendment to the zoning ordinance to create a governmental zone, and Ordinance 2007-03, an amendment to the zoning map to create a governmental zone. Following the public hearing, the Plan Commission approved the two ordinances and certified them to the Town Council who subsequently enacted the ordinances. Scalabrinio then amended his complaint to include a request for a declaratory judgment that Ordinances 2007-02 and 2007-03 are illegal and void.

On December 14, 2007, T-Mobile filed a motion for summary judgment, which the Town joined on February 1, 2008. The trial court held a hearing on the motion on April 4, 2008 and granted summary judgment in favor of the Town and T-Mobile.

Parties' Arguments

I. Lease of Property

Scalabrinio argues that the Town acted improperly when it leased the property to T-Mobile for the construction of the cell tower. First, Scalabrinio argues that the cell tower would violate the height restrictions of the zoning ordinance as they existed at the time the lease was signed. Second, Scalabrinio argues that the Town did not follow the correct procedures when it leased the property to T-Mobile and then tried to fix its mistakes later by passing a retroactive resolution.

II. Amendments to Zoning Ordinance

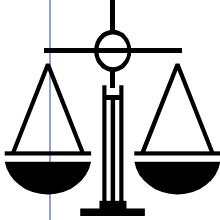
Scalabrinio argues that the Town also acted improperly when it amended its zoning ordinance to create the governmental zoning district. Scalabrinio first argues that Ordinances 2007-02 and 2007-03 constitute impermissible spot zoning because they create a specific exception from the height restrictions to allow the construction of the

cell tower. Scalabrinio also argues that the Town acted with improper motives in amending the zoning ordinance because they did so only for economic reasons – the Town would receive rental payments from T-Mobile for the leased property – and to try to avoid the law suit that Scalabrinio had filed challenging the construction of the cell tower.

The Town argues that construction of the cell tower would extend cellular phone signal coverage not only to the Town, but also to the shore and boundary waters of nearby Lake Michigan. The Town also argues that it created the new governmental zoning district so that it could control the location of structures such as cell towers and preserve the residential nature of other areas of the Town.

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CASE SYNOPSIS



Glossary:

Bidding Procedure:

The normal procedure by which a town may lease its property, which is governed by Indiana Code section 36-1-11-10. The town must have the property appraised and accept bids for the lease of the property.

Declaratory Judgment:

A law suit requesting the trial court to determine the legal rights and relationships of the parties. In this case, Scalabrinio asked the trial court to declare that the resolution authorizing the lease and the zoning ordinance amendments were invalid.

Municipal Code:

The local laws of the town, made up of the collected ordinances and resolutions passed by the town council. The municipal code includes the zoning ordinance.

Permanent Injunction:

A court order issued after the trial court has decided a lawsuit. In this case, the permanent injunction would prevent the Town from leasing property for the construction of the cell tower or any other structure that violates the zoning ordinance.

Preliminary Injunction: A court order intended to prevent an irreparable injury from occurring before the trial court has decided a lawsuit. In this case, the preliminary injunction would prevent T-Mobile from constructing the cell tower until the lawsuit is decided.

Request for Proposals:

An alternative procedure by which a town may lease its property, which is governed by Indiana Code section 36-1-11-12. The town must publish a request for proposals for the lease giving specific details of what the lease must entail and how the town will select the best proposal.

Spot Zoning:

Singling out one piece of property for a different treatment from that accorded to similar surrounding land which is indistinguishable from it in character, all for the economic benefit of the owner of the lot or area so singled out. For example, zoning a corner lot in a residential district commercial so that the lot owner can construct a gas station.

Summary Judgment:

A judgment granted by the trial court before a trial or before the end of a trial because the trial court determines that there is no genuine issue of material fact regarding the dispute and one party is entitled to judgment as a matter of law.

Temporary Restraining Order:

A court order preserving the status quo – in this case preventing T-Mobile from constructing the cell tower – until the trial court can hold a hearing on a preliminary or permanent injunction.

Town Council:

A council made up of residents of a town that serves as both the legislative and executive branches of the town's government. The council is responsible for both passing local laws and administering the town's governmental departments such as police, fire, and streets and sanitation.

Zoning District:

A geographical location within the Town within which only certain types of structures may be built. For example, only homes may be built in a residential district; stores and restaurants may only be built in a commercial or business district; factories or warehouses may only be built in an industrial district.

Zoning Ordinance:

A town ordinance that regulates how land within various parts of the town may be used by creating certain zoning districts.

TODAY'S PANEL OF JUDGES

Hon. Patricia A. Riley (Jasper County), Presiding

- Judge of the Court of Appeals since June 1994

Patricia A. Riley, currently the presiding judge for the Court of Appeals' Fourth District, was named to the Indiana Court of Appeals by Governor Evan Bayh in January of 1994. A native of Rensselaer, Indiana, Judge Riley earned her bachelor's degree from Indiana University -Bloomington in 1971 and her law degree from the Indiana University School of Law-Indianapolis in 1974. Early in her career she served as a Deputy Prosecutor in Marion County and a public defender in Marion and Jasper counties before entering into private practice in Jasper County. She served as a judge of the Jasper Superior Court from 1990 to 1993. She is a former associate professor at St. Joseph's College in Rensselaer and currently an adjunct professor at the Indiana University School of Law-Indianapolis.

Judge Riley's legal memberships include the Indianapolis Bar Association, the Marion County Bar

"Appeals on Wheels"

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

The Court of Appeals has held over 200 "on the road" cases since early 2000.

Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. Margret G. Robb (Tippecanoe County)

- Judge of the Court of Appeals since July 1998

Margret G. Robb was appointed to the Indiana Court of Appeals in July 1998 by Gov. Frank O'Bannon. She holds a B.S. and M.S. in Business Economics from Purdue, and is a 1978 Magna Cum Laude graduate of Indiana University School of Law - Indianapolis.

Prior to joining the Court she was engaged in the general practice of law for 20 years in Lafayette and was a Chapter 11, 12 and a Standing Chapter 7 Bankruptcy trustee for the Northern District of Indiana; and the Federal Advisory Committee for the expediting of Federal Litigation. She was a registered family and civil law mediator and served as a Tippecanoe County Deputy Public Defender. She chairs the Supreme Court Task Forces on Family Courts, the development of Trial Court Local Rules, and is involved in several projects to benefit the Indiana legal system. She has also served as a member of the Indiana Board of Law Examiners, the Governance Committee of the Supreme Court IOLTA (Interest On Lawyers' Trust Accounts) Committee; the Federal Advisory Committee on Local Rules for the Federal Court for the Northern District of Indiana; and Federal Advisory Committee for the expediting of Federal Litigation.

Judge Robb has held numerous Board positions for and been an officer for the Indiana State Bar Association, Indiana Bar Foundation, Tippecanoe County Bar Association, Indianapolis Bar Association, Indianapolis Bar Foundation, American Bar

Foundation, National Association of Women Judges, Indiana University School of Law at Indianapolis Alumni Association, and speaks frequently on legal topics for attorneys and other judges.

Judge Robb was Founding Chair of the Governor Otis Bowen's Commission on the Status of Women; was a recipient of the 1993 Indiana State Bar Association's "Celebrating 100 Years of Women in the Legal Profession" award; the 2001 Maynard K. Hine distinguished alumni award, given in recognition of support and service to IUPUI and Indiana University; the 2004 Bernadette Perham "Indiana Women of Achievement" Award, bestowed by Ball State University in honor of one of their outstanding professors; the 2005 Indiana State Bar Association's Women in the Law Recognition Award; and the 2006 Tippecanoe County YWCA Salute to Women "Women of Distinction" Award.

Judge Robb, who was retained on the Court of Appeals by election in 2000, lives in West Lafayette with her husband, a Professor of Communication at Purdue (M.A. and Ph.D., Indiana University). Their son, Douglas, a graduate of the U.S.N.A., recently embarked on his second deployment.

The 15 judges of the Indiana Court of Appeals issue more than 2,800 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.



TODAY'S PANEL OF JUDGES

Hon. Michael P. Barnes (St. Joseph County)

- Judge of the Court of Appeals since May 2000

Michael P. Barnes was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon on May 22, 2000. Judge Barnes received his B.A. from St. Ambrose College in Davenport, Iowa in 1970 and his J.D. from the University of Notre Dame Law School in 1973.

He was a Deputy Prosecuting Attorney and privately practiced law in South Bend from 1973 to 1978. In 1978 he was elected the St. Joseph County Prosecuting Attorney, a position he held for 20 years. During that tenure, Judge Barnes was elected President of the National District Attorneys Association (1995-1996), Chairman of the Board, Indiana Prosecuting Attorneys Council (1982-1983, 1992-1993), President of the St. Joseph County Bar Association (1992-1993), National Board of Trial Advocacy (1995-1996), National Advisory Council on Violence Against Women (1997), Chairman of the Board of Regents, National College of District Attorneys (1997-1998), American Prosecutor's Research Institute (1997-

1998), and various other professional and civic organizations.

Judge Barnes is a member of the Indiana Bar Foundation, the St. Joseph County Bar Association, and serves on the Board of Directors of the Friends of the St. Joseph County Juvenile Justice Center and the Indiana Judges Association. Judge Barnes was retained on the Court of Appeals by election in 2002. He is married to Alberta Edwards Barnes, and they are the parents of two sons, Tim and John.

ATTORNEYS FOR THE PARTIES

For Appellant, :

Matthew Hagenow
Newby, Lewis, Kaminski & Jones, LLP
LaPorte

Matthew Hagenow is a partner in the law firm Newby, Lewis, Kaminski & Jones, LLP in LaPorte, Indiana. He received a B.S. degree from the University of Notre Dame in 1994 and a J.D. degree, cum laude, from the University of Notre Dame Law School in 2000. Since that time, he has been with Newby, Lewis, Kaminski & Jones focusing his practice on civil litigation and civil appeals. He represents clients in lawsuits involving real estate, business, labor and employment, worker's compensation and personal injury claims. He also represents clients before administrative

agencies involving real estate and employment matters. He negotiates real estate and business transactions for clients and counsels clients regarding labor and employment matters. He has jury trial experience in personal injury cases and has bench trial experience in various real estate, business and worker's compensation matters. He has represented clients in numerous appellate matters before the Indiana Court of Appeals and the Indiana Supreme Court, although this is his first oral argument before the Indiana Court of Appeals.

For Appellee, Town of Michiana Shores and :

Jeffrey F. Gunning
Pinkerton and Friedman Professional Corporation
Munster

Jeffrey F. Gunning is a graduate of Wabash College (1977) and Valparaiso University School of Law (1988.) Although his law practice focuses on business and corporate law and complex litigation, he also has had many years experience as a municipal, land use and zoning lawyer. He is presently the Town Attorney for the Town of Michiana Shores and President of the Indiana Municipal Lawyers Associa-

tion. Mr. Gunning is licensed to practice law in both Indiana and Illinois and is admitted to practice in Federal courts in both states as well as with the U.S. Seventh Circuit Court of Appeals and the U.S. Tax Court. This is his third appearance for oral argument before the Court of Appeals.

For Appellee, T-Mobile :

F. Joseph Jaskowiak
Hoeppner Wagner & Evans
Merrillville

F. Joseph Jaskowiak is a graduate of Illinois Wesleyan University and obtained his J.D. in 1979 from Valparaiso University School of Law. Since 1979, Mr. Jaskowiak has been employed at the law firm of Hoeppner Wagner & Evans. The firm has offices in Valparaiso and Merrillville, IN and Mr. Jaskowiak practices out of the Merrillville office. The primary focus of his work over the years has been litiga-

tion and employment law. In those areas, he has been involved in a number of injunction cases. This will be Mr. Jaskowiak's second oral argument before the Court of Appeals, in addition to two oral arguments before the Indiana Supreme Court. He has also argued before the Seventh Circuit Court of Appeals on a number of occasions.